

No. 12866

2679

United States
Court of Appeals
for the Ninth Circuit.

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA and JAMES
J. BOYLE, United States Marshal for the
Southern District of California,

Appellees.

Transcript of Record

Appeals from the United States District Court,
Southern District of California,
Central Division.

FILED

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PAUL J. BARRON

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

OTTO CHRISTENSEN,

JERRY GIESLER,

1212 Spring Arcade Bldg.,

541 S. Spring St.,

Los Angeles 13, Calif.

For Appellee:

ERNEST A. TOLIN,

United States Attorney,

600 U. S. Court House Bldg.,

Los Angeles 12, Calif.

At a stated term, to wit: The February Term. A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 19th day of February in the year of our Lord one thousand nine hundred and fifty-one.

UNITED STATES OF AMERICA

vs.

AARON SMEHOFF, Alias ALLEN SMILEY

Present: The Honorable Dave W. Ling,
District Judge.

MINUTE ORDER OF FEBRUARY 19, 1951
IN CASE Nos. 20069 AND 20604
No. 20,069-Cr. and No. 20,604-Cr.

On motion of Ernest A. Tolin, United States Attorney, appearing as counsel for Gov't, it is ordered that the Mandate of the U. S. Court of Appeals for the Ninth Circuit reversing the conviction on count one of the Indictment No. 20,069 and the conviction in Case No. 20,604 with directions for acquittal on said counts, and affirming the conviction on count 3 of Indictment No. 20,069-Crim., be filed and entered, and that acquittal on count one of Indictment No. 20,069-Crim., and of the charge in Case No. 20,604-Crim. be entered.

Otto Christensen and Jerry Giesler, Esqs., are present as counsel for defendant, who is [2*] present.

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 19th day of February, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Dave W. Ling,
District Judge.

[Title of Cause.]

MINUTE ORDER OF FEBRUARY 19, 1951
IN CASE No. 20609

This cause now coming before the Court; Ernest A. Tolin, United States Attorney, appearing as counsel for Government; Otto Christensen and Jerry Giesler, Esqs., appearing as counsel for defendant, who is present.

Attorney Christensen files motion for correction or reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure and argues in support of same. Attorney Tolin argues in opposition.

It is ordered that said motion be, and it hereby is, denied.

Attorney Christensen, on behalf of Judge Keating, counsel for defendant in the immigration matters, requests that the Court make a recommendation that the defendant be not deported

because of the fact of conviction in this case, which application is denied.

It is ordered that the defendant be committed to the custody of the U. S. Marshal and his bond on appeal be exonerated.

Attorney Christensen files motion to vacate and for relief pursuant to Section 2255 of Title 28, U. S. Code, together with copy of the transcript of record on petition for writ of certiorari in the Supreme Court of the United States and copy of the opinion of the United States Court of Appeals for the Ninth Circuit in Case No. 12,375 on supplemental petition for rehearing and argues in support of said motion. Attorney Tolin argues in opposition. Court orders motion denied and that counsel prepare and submit for signature of the Court proposed findings of fact, conclusions of law, and order. [3]

At 11:10 a.m. court recesses to 2 p.m. for further proceedings.

At 2 p.m. court reconvenes herein and, all being present as before, including counsel for both sides, Attorney Tolin submits form of Findings of Fact, Conclusions of Law, and Order. Counsel discuss corrections in the form. Court signs same after corrections.

Attorney Christensen files Notice of Appeal.

Attorney Christensen moves for bail pending appeal. Court orders said motion denied. [4]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 20069

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALLEN SMILEY,

Defendant.

MOTION TO VACATE AND FOR RELIEF
PURSUANT TO SECTION 2255, TITLE 28,
UNITED STATES CODE

Comes Now the defendant and petitioner, Allen Smiley, and moves the Court for relief pursuant to Section 2255, Title 28, United States Code, upon the following grounds:

1. (a) That the sentence was imposed in violation of the Constitution, and laws of the United States;

(b) That the Court was without jurisdiction to impose such sentence; and

(c) That the evidence discloses he was not guilty of the offense charged.

2. In support of said Motion, the defendant petitioner shows unto the Court, as follows:

(a) That he is now in custody of the United States Marshal, in and for the Southern District of California, Central Division, and is being restrained illegally by virtue of a certain judgment

entered by the United States District Court, Southern District of California, Central Division; [5]

(b) That your petitioner was convicted on Counts 1 and 3 of the above-numbered indictment and on indictment No. 20604, each charging the defendant with the violation of Section 746 (a) 18, Title 8, United States Code, and sentenced by this Court to one year's imprisonment on each of said counts, said sentences to run concurrently, and to pay a fine of \$1,000.00 on each of said counts.

Said case was appealed to the United States Court of Appeals for the Ninth Circuit, and said Court reversed the judgment and sentence on Count 1 of indictment No. 20069 and the judgment and sentence of indictment No. 20604, and affirmed the judgment of conviction and sentence on Count 3 of indictment No. 20069.

That the mandate of said Court of Appeals was received by the Clerk of this Court on the . . . day of January, 1951, and the same was spread by this Court on February 19, 1951.

The opinion of said Court of Appeals is reported in 181 Fed. (2) 505, and appears on page 288 of the certified copy of the record on appeal in the above-entitled case, which is attached hereto and made a part hereof. That the Court of Appeals in its opinion reversing the judgment and sentence on each of said two counts held that evidence of a claim of birth in the United States and to having lived all of one's life in the United States was not a false representation of United States citizenship.

That in a subsequent opinion rendered by the

United States Court of Appeals for the Ninth Circuit, on January 19, 1951, on a supplemental Petition for Rehearing [a copy of which Opinion is attached hereto and made a part hereof], it was held that the third count of indictment No. 20069 upon which the petitioner stands convicted "charged the misrepresentation of citizenship to have been made to one Siu, a deputy sheriff of Los Angeles [6] County. The evidence disclosed that the false statements with which appellant was charged were made in the course of a booking operation in the sheriff's office, after an arrest. The answers were recorded on a form sheet provided for the purpose. It appears that the lower portion of the form which contains the false statement was filled in by Deputy Sheriff Hopkins, not Siu, and that Siu did not hear the false answers." The foregoing affirmative finding of fact by the Court of Appeals establishes that the evidence to sustain the count on which your petitioner stands convicted is precisely the same as was offered and received to support the above two reversed counts. Further, Siu, to whom the alleged misrepresentation of citizenship was made, testified that at another time outside of the presence of Deputy Sheriff Hopkins he asked the petitioner where he was born and how long he had lived in the United States, and that your petitioner replied that he was born in New York and had lived all of his life in the United States. Deputy Sheriff Hopkins testified that Siu was not present and had left the County Jail booking office and was not present at the time he, Hopkins, asked the peti-

tioner if he were a citizen of the United States. There was no evidence whatsoever that petitioner made any representation of United States citizenship to Siu, or that Siu was present when any representation of United States citizenship was made. That Siu was not present at the time the representation was made is clear from the record; in addition thereto, we have filed an Affidavit of said government witness, Jacob E. Siu, attached hereto, which reads as follows:

“That at no time did I ask the question appearing in Exhibit 5, ‘United States citizen?’ of Mr. Smiley, neither at the time of my interviewing him at 414½ North Hill Street, on or about the 25th [7] day of May, 1944, or later that day at the County Jail booking office in the presence of Milton S. Hopkins, Deputy Sheriff, or at any other time hear such a question put to Mr. Smiley. Neither on said day, or at any other time, did Mr. Smiley say to me that he was a citizen of the United States, nor did I hear him say so to any other person.”

Thus, the petitioner stands convicted of an offense not charged, because if he had been acquitted on the Siu count he could, nevertheless, have been charged with misrepresentation of citizenship to Hopkins and convicted.

Wherefore, petitioner prays this Honorable Court to vacate and set the judgment aside and discharge petitioner, or grant him a new trial, and for such other and further relief as may seem meet and appropriate, and in support of said Motion shall

rely upon the said Motion, and the files and records of the case which by reference are made a part hereof.

/s/ ALLEN SMILEY,
Petitioner.

OTTO CHRISTENSEN, and
JERRY GIESLER,
By /s/ OTTO CHRISTENSEN,
Attorneys for Defendant.

Allen Smiley, being sworn, states that the foregoing, signed by him, is true.

/s/ ALLEN SMILEY.

Subscribed and sworn to before me this 19th day of February, 1951.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court.

By /s/ THEODORE HOCKE,
Deputy. [8]

EXHIBIT A

United States Court of Appeals
For the Ninth Circuit

No. 12,375

ALLEN SMILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Jan. 19, 1951

On Supplemental Petition for Rehearing and
Motion to Remand

Before: Denman, Chief Judge; Stephens and Orr,
Circuit Judges.

Orr, Circuit Judge:

OPINION

This court has rarely, if ever, been asked to entertain a proceeding of this character. We do not wish to be understood as giving it our stamp of approval as a regular practice because such a practice would be sanctioning one more step in the almost interminable delays which attend some criminal proceedings. Because of the contention that the crime charged in the indictment was separate and distinct from that upon which appellant was tried and convicted and that appellant was not aware of the

variance until a very late date, we deem it expedient to entertain the supplemental petition. Here we have a case where a conviction was had in the trial court, an appeal taken to this circuit court, the judgment affirmed, a rehearing denied; a petition to the Supreme Court of the United States for certiorari; the petition denied; a rehearing asked and denied, and now a supplemental petition to this court for rehearing and motion to remand.

The petition for rehearing presented to the Supreme Court of the United States asserted, for the first time, the contention now made to us in the supplemental petition. Appellant Smiley was [9] convicted in the District Court of the United States, Southern District of California, Central Division, of fraudulently representing himself as a citizen of the United States. He was convicted on three counts. On appeal we reversed as to two and sustained the third.

The third count charged the misrepresentation of citizenship to have been made to one Siu, a deputy sheriff of Los Angeles, California. The evidence disclosed that the false statements with which appellant was charged were made in the course of a booking operation at the Sheriff's office, after an arrest. The answers were recorded on a form sheet provided for that purpose. It appears that the lower portion of the form which contains the false statement was filled in by Deputy Sheriff Hopkins, not Siu and that Siu did not hear the false answers. Hence, it is argued that a fatal variance exists between the allegation and proof.

Deputy Sheriff Siu made an affidavit after trial as to the circumstances.

At the trial counsel for appellant relied on the theory that no crime had been committed because the person to whom the false misrepresentations were made was not one having a legal right to ask the questions in furtherance of official authority and authorized by a law which imposed a duty on the questioned individual to answer. We rejected this theory but mention it in connection with our required inquiry as to whether the alleged variance is material and of a character which could have misled the defendant at the trial and thus deprived him of a substantial right and the further inquiry as to whether appellant has been protected against another prosecution for the same offense. The true inquiry is not whether there has been a variance but was it such as to affect the substantial rights of the accused. *Berger v. United States*, 295 U.S. 78, 82; *United States v. Regan*, 314 U.S. 513, 526. "No variance ought ever to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial." *Washington & Georgetown R. Co. v. Hickey*, 166 U.S. 521, 531. In a criminal case there must "be added the further requisite that the variance be not such as to deprive the accused of his right to be protected against [10] another prosecution for the same offense." *Berger v. United States*, *supra*, p. 83.

Rule 52(a) of the Rules of Criminal Procedure

provides: "Any error, defect, irregularity, or *variance* which does not affect substantial rights shall be disregarded." Emphasis added. This provision is said to restate the prior law. In the instant case we have a variance in names. Not every such variance is fatal. *Ex Parte Hull*, 312 U.S. 546; *Bennett v. United States*, 227 U.S. 333; *Ferrari v. United States*, 9 Cir. 169 F. 2d 353.

Measuring the situation in the instant case by the yardstick announced in the cited cases, we find no fatal variance. The entire proceeding relating to giving of the false answer to the deputy sheriff, was carried on in a room in which Deputy Sheriff Siu was present most, if not all, of the time. The document upon which the alleged false answer of appellant was recorded was in evidence at the trial. It would be idle to say that the able counsel representing appellant was not advised of the entire circumstances of the making of the answer if not of the particular party to whom made. He was not concerned so much with that phase of the case because of his conception of the law. It is evident that the same defense would have been made had Hopkins been named in the indictment. As an evidence of how little concern counsel for appellant placed on the particular individual in the Sheriff's office to whom the alleged statements were made, we cite his statements to the trial court in argument for a new trial. In explanation as to why the appellant was not called as a witness, counsel stated:

"The facts are so simple in the case. In fact, we did not dispute them, stipulating that he was an

alien, and, secondly, virtually admitting that on the occasions of his interviews by booking officers . . . that he was asked certain questions with reference to his birth, . . . it was for that reason, Your Honor, that I did not place the defendant on the stand, because, if he had been, he would testify precisely that way under oath, . . . I may have made a mistake because the jury didn't hear the sound of the voice of the defendant, but I could see no purpose because there was nothing to deny as far as the actual facts of the case were concerned." [11]

This statement of counsel, made after the trial, can be relevant only to point up the theory on which the case was tried and leaves no reason for a finding of surprise and that a different defense would or could have been urged in the event Hopkins had been named in the indictment. The evidence at the trial was in part documentary. It is of such a character as to firmly peg the crime charged to the circumstances of time and place and persons present in such a manner as to fully protect appellant against another prosecution for the same offense. He would have no difficulty were another prosecution attempted in showing former jeopardy.

The supplemental petition for rehearing is denied, as is also the motion to remand.

[Endorsed]: Opinion. Filed Jan. 19, 1951. Paul P. O'Brien, Clerk. [12]

EXHIBIT B

In the Supreme Court of the United States

No. 124

ALLEN SMILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF JACOB E. SIU

State of California,

County of Los Angeles—ss.

Jacob E. Siu, being first duly sworn, deposes and says: That he is the Jacob E. Siu who testified as a witness on behalf of the United States of America in the case of United States v. Smiley (No. 20069);

That at no time did I ask the question appearing in Exhibit 5, "United States citizen?" of Mr. Smiley, neither at the time of my interviewing him at 414½ North Hill Street, on or about the 25th day of May, 1944, or later that day at the County Jail booking office in the presence of Milton S. Hopkins, Deputy Sheriff, or at any other time hear such a question put to Mr. Smiley; Neither on said day, or at any other time, did Mr. Smiley say to me that he was a citizen of the United States, nor did [13] I hear him say so to any other person.

/s/ JACOB E. SIU.

Subscribed and sworn to before me this 19th day of October, 1950.

[Seal] /s/ MINNIE F. CHITWOOD,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Feb. 19, 1951, U.S.D.C. [14]

[Title of District Court and Cause.]

No. 20069

FINDINGS OF FACT AND CONCLUSIONS
OF LAW CONCERNING DEFENDANT'S
MOTION TO VACATE AND FOR RELIEF
PURSUANT TO SECTION 2255, TITLE 28,
UNITED STATES CODE

Be It Remembered that on the 19th day of February, 1951, at the hour of 10 o'clock a.m., defendant, present in court with his counsel, Otto Christensen, Jerry Giesler and Frank Desimone, filed his motion designated Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code;

Whereupon, the following proceedings were had, Honorable Dave Ling, Judge of this Court, presiding:

Defendant was personally present during the entire proceedings and represented by counsel above named. The plaintiff was represented by Ernest A.

Tolin, United States Attorney. Defendant called up his said motion for hearing immediately after the filing thereof, whereupon the Court received documentary evidence, to wit: A copy of an Affidavit which had been filed with the Supreme Court of the United States in connection with a petition of defendant for a writ of certiorari concerning his conviction herein. Defendant offered into evidence and the Court received a copy of the opinion of the United States Court of Appeals for the Ninth Circuit on Supplemental Petition for Rehearing and Motion to Remand. Defendant offered his verified motion and the files and records of the case. [15] Following argument and consideration thereof the Court does now find the facts to be:

1. That the sentence imposed upon defendant herein is not in violation of the Constitution and is not in violation of the laws of the United States or of any law of the United States; that the Court was with jurisdiction to impose said sentence; that the evidence discloses defendant was guilty of the offense charged.

2. It is true that defendant is now in custody of the Attorney General of the United States by his representative, the United States Marshal in and for the Southern District of California. It is true that he is being restrained of his liberty by virtue of said custody. The Court finds that said restraint is by virtue of that certain judgment entered by this Court herein which, among other things, committed the defendant to the custody of the Attorney General of the United States for the term of one

year and which is the judgment complained of in the motion respecting which these findings are made.

3. It is true that defendant was convicted on Counts One and Three of an indictment filed in this Court under the case number designated hereon and on an indictment No. 20604. It is true that each of said counts and the single count of indictment No. 20604 charged the defendant with the violation of Section 746 (a) 18, Title 8, United States Code. It is true that defendant was thereupon sentenced by this Court to one year imprisonment on each of said counts and that said sentences were ordered to run concurrently and that defendant was sentenced to pay a fine of \$1,000.00 on each of said counts. It is true that said case was appealed to the United States Court of Appeals for the Ninth Circuit and that said Court reversed the judgment and sentence on Count One of the indictment in case No. 20069, and the judgment and sentence imposed by reason of conviction of the indictment in case No. 20604. It is true that said United States Court of Appeals for the Ninth Circuit affirmed the judgment of conviction on Count Three of indictment No. 20069. It is true that defendant thereafter petitioned the Supreme Court of the United States for a writ of certiorari as to that judgment of conviction which was affirmed as aforesaid. It is true that in connection with a petition for rehearing of said petition for a writ of [16] certiorari, the defendant filed with the Supreme Court an Affidavit by one J. E. Siu and presented to that Court an argument that there had been a variance between the indictment

upon which the appellant was tried and convicted and the proof adduced at the trial. It is true that the Supreme Court of the United States denied defendant a writ of certiorari. It is true that thereafter defendant filed a Supplemental Petition for Rehearing and Motion to Remand in the United States Court of Appeals for the Ninth Circuit, wherein defendant raised in that Court the contention that there had been a variance between the Court of the indictment upon which he was convicted and the proof which had been adduced in support thereof. It is true that the opinion of the said Court of Appeals thereafter transmitted its Mandate to this Court; that said Mandate has been received and spread upon the Minutes and records of this Court. It is true that portions of the Opinion by the Court of Appeals for the Ninth Circuit on Supplemental Petition for Rehearing and Motion to Remand have not been fully set forth in defendant's motion, but that, on the contrary, portions only thereof have been copied, but a certified printed copy thereof is attached to the motion, and that said Opinion reads in full as follows: [17]

“This court has rarely, if ever, been asked to entertain a proceeding of this character. We do not wish to be understood as giving it our stamp of approval as a regular practice because such a practice would be sanctioning one more step in the almost interminable delays which attend some criminal proceedings. Because of the contention that the crime charged in the indictment was separate and distinct from that upon which appellant

was tried and convicted and that appellant was not aware of the variance until a very late date, we deem it expedient to entertain the supplemental petition. Here we have a case where a conviction was had in the trial court, an appeal taken to this circuit court, the judgment affirmed, a rehearing denied; a petition to the Supreme Court of the United States for certiorari; the petition denied; a rehearing asked and denied, and now a supplemental petition to this court for rehearing and motion to remand.

“The petition for rehearing presented to the Supreme Court of the United States asserted, for the first time, the contention now made to us in the supplemental petition. Appellant Smiley was convicted in the District Court of the United States, Southern District of California, Central Division, of fraudulently representing himself as a citizen of the United States. He was convicted on three counts. On appeal we reversed as to two and sustained the third.

“The third count charged the misrepresentation of citizenship to have been made to one Siu, a deputy sheriff of Los Angeles, California. The evidence disclosed that the false statements with which appellant was charged were made in the course of a booking operation at the Sheriff’s office, after an arrest. The answers were recorded on a form sheet provided for that purpose. It appears that the lower portion of the form which contains the false statement was filled in by Deputy Sheriff Hopkins, not Siu, and that Siu did not hear the false answers.

Hence, it is argued that [18] a fatal variance exists between the allegation and proof.

“Deputy Sheriff Siu made an affidavit after trial as to the circumstances.

“At the trial counsel for appellant relied on the theory that no crime had been committed because the person to whom the false misrepresentations were made was not one having a legal right to ask the questions in furtherance of official authority and authorized by a law which imposed a duty on the questioned individual to answer. We rejected this theory, but mention it in connection with our required inquiry as to whether the alleged variance is material and of a character which could have misled the defendant at the trial and thus deprived him of a substantial right and the further inquiry as to whether appellant has been protected against another prosecution for the same offense. The true inquiry is not whether there has been a variance, but was it such as to affect the substantial rights of the accused. *Berger v. United States*, 295 U.S. 78, 82; *United States v. Regan*, 314 U.S. 513, 526. ‘No variance ought ever to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial.’ *Washington & Georgetown R. Co. v. Hickey*, 166 U.S. 521, 531. In a criminal case there must ‘be added the further requisite that the variance be not such as to deprive the accused of his right to be protected against another prosecution for the same offense.’ *Berger v. United States*, *supra*, p. 83.

“Rule 52(a) of the Rules of Criminal Procedure provides: ‘Any error, defect, irregularly or *variance* which does not affect substantial rights shall be disregarded.’ Emphasis added. This provision is said to restate the prior law. In the instant case we have a variance in names. Not every such variance is fatal. *Ex Parte Hull*, 312 U.S. 546; *Bennett v. United States*, 227 U.S. 333; [19] *Ferrari v. United States*, 9 Cir. 169 F. 2d 353.

“Measuring the situation in the instant case by the yardstick announced in the cited cases, we find no fatal variance. The entire proceeding relating to giving of the false answer to the deputy sheriff was carried on in a room in which Deputy Sheriff Siu was present most, if not all, of the time. The document upon which the alleged false answer of appellant was recorded was in evidence at the trial. It would be idle to say that the able counsel representing appellant was not advised of the entire circumstances of the making of the answer if not of the particular party to whom made. He was not concerned so much with that phase of the case because of his conception of the law. It is evident that the same defense would have been made had Hopkins been named in the indictment. As an evidence of how little concern counsel for appellant placed on the particular individual in the Sheriff’s office to whom the alleged statements were made, we cite his statements to the trial court in argument for a new trial. In explanation as to why the appellant was not called as a witness, counsel stated:

“ ‘The facts are so simple in the case. In fact,

we did not dispute them, stipulating that he was an alien, and, secondly, virtually admitting that on the occasions of his interviews by booking officers . . . that he was asked certain questions with reference to his birth, . . . it was for that reason, Your Honor, that I did not place the defendant on the stand, because, if he had been, he would testify precisely that way under oath, . . . I may have made a mistake because the jury didn't hear the sound of the voice of the defendant, but I could see no purpose because there was nothing to deny as far as the actual facts of the case were concerned.'

"This statement of counsel, made after the trial, can be relevant only to point up the theory on which the case was tried and leaves no reason for a finding of surprise and that a [20] different defense would or could have been urged in the event Hopkins had been named in the indictment. The evidence at the trial was in part documentary. It is of such a character as to firmly peg the crime charged to the circumstances of time and place and persons present in such a manner as to fully protect appellant against another prosecution for the same offense. He would have no difficulty were another prosecution attempted in showing former jeopardy.

"The supplemental petition for rehearing is denied, as is also the motion to remand." [21]

4. It is not true that the defendant stands convicted of an offense not charged and the Court affirmatively finds that there was no material variance between pleading and proof, but that defendant had a full, fair trial wherein there was no denial

or infringement of any of the constitutional rights of the defendant and there was no violation or infringement of any of the legal rights of the defendant. The Court finds that the evidence adduced at the trial fully supports the judgment and that the conviction, sentence and present imprisonment of defendant are, and each of them is, lawful and proper.

Conclusion of Law

As a conclusion of law from the foregoing facts the Court concludes that the Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, is without merit; that the defendant is properly imprisoned; that he is not entitled to be released upon any of the grounds stated in said motion, and that there are no conditions existing which entitled defendant to any of the relief described in Section 2255 of Title 28, United States Code, and that the aforesaid Motion to Vacate and for Relief pursuant to Section 2255, Title 28, United States Code, should be denied.

/s/ DAVE W. LING,

United States District Judge.

Dated: February 19, 1951.

[Endorsed]: Filed Feb. 19, 1951. [22]

In the United States District Court in and for the
Southern District of California, Central Division

No. 20069—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALLEN SMILEY,

Defendant.

ORDER DENYING MOTION TO VACATE AND
FOR RELIEF PURSUANT TO SECTION
2255, TITLE 28, UNITED STATES CODE

Be It Remembered that the motion of defendant to vacate and for relief pursuant to Section 2255, Title 28, United States Code, came on regularly to be heard in open Court at the hour of 10:00 a.m., February 19, 1951, the Honorable Dave Ling, Judge Presiding. The Court, having received evidence and heard and considered the arguments of counsel and having made its Findings of Fact and Conclusions of Law, does now deny said Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code.

Dated: This 19th day of February, 1951.

/s/ DAVE W. LING,

United States District Judge.

Order entered Feb. 19, 1951.

[Endorsed]: Filed Feb. 19, 1951. [23]

[Title of District Court and Cause.]

No. 20069

NOTICE OF APPEAL

Allen Smiley, Sunset Plaza, Los Angeles, California, Appellant.

Otto Christensen, 541 South Spring Street, Los Angeles 13, California, and Jerry Giesler, 9200 Wilshire Boulevard, Beverly Hills, California, Attorneys for Appellant.

Offense: Appellant was convicted on July 14, 1949, on the violation of United States Code, Title 8, Sec. 746 (a) (18), on Count 3 of Indictment No. 20069.

Date of Judgment: July 25, 1949.

Judgment and/or sentence: Committed to custody of Attorney General for one year and to pay a fine of \$1,000.00.

Said appellant is now in custody of the United States Marshal, in and for the Southern District of California.

Appellant filed his Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, which said Motion, on February 19, 1951, was denied. [24]

I, the above-named appellant, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order and Judgment of the Dis-

trict Court denying the Motion to Vacate Pursuant to Section 2255 on the grounds set forth below.

ALLEN SMILEY,

By /s/ OTTO CHRISTENSEN.

OTTO CHRISTENSEN, and

JERRY GIESLER,

By /s/ OTTO CHRISTENSEN.

Grounds:

a. That the sentence was imposed in violation of the Constitution, and laws of the United States;

b. That the Court was without jurisdiction to impose such sentence;

c. That the evidence discloses he was not guilty of the offense charged;

d. The trial court made erroneous Findings of Fact;

e. The trial court made erroneous Conclusions of Law.

OTTO CHRISTENSEN, and

JERRY GIESLER,

By /s/ OTTO CHRISTENSEN.

[Endorsed]: Filed Feb. 19, 1951. [25]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 12885—BH

UNITED STATES OF AMERICA, ex rel. ALLEN
SMILEY,

Petitioner,

vs.

JAMES BOYLE,

Respondent.

PETITION FOR WRIT OF
HABEAS CORPUS

Your petitioner, Allen Smiley, respectfully represents that he is being restrained illegally by virtue of a certain judgment entered by the United States District Court, Southern District of California, Central Division. That he is now in the custody of James Boyle by virtue of said judgment, said James Boyle being the United States Marshal in and for said District.

That your petitioner was convicted on Counts 1 and 3 of Indictment No. 20069 and on Indictment No. 20604, in the above Court, each charging the defendant for the violation of Section 746 (a) 18, Title 8, United States Code, and sentenced by this Court to one year's imprisonment on each of said counts, said sentences to run concurrently, and to pay a fine of \$1,000.00 on each of said counts.

Said case was appealed to the United States Court of Appeals for the Ninth Circuit, and said Court reversed the judgment and sentence on Count

1 of Indictment No. 20069 and the judgment and sentence of Indictment No. 20604, and affirmed the judgment of [26] conviction and sentence on Count 3 of Indictment No. 20069.

That the mandate of said Court of Appeals was received by the Clerk of this Court on the day of January, 1951, and the same was spread by this Court on February 19, 1951.

The opinion of said Court of Appeals is reported in 181 Fed. (2) 505, and appears on page 288 of the certified copy of the record on appeal in the above-entitled case, which is attached to the Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, which is made a part hereof by reference. That the Court of Appeals in its opinion reversing the judgment and sentence on each of said two counts held that evidence of a claim to birth in the United States and to having lived all of one's life in the United States was not a false representation of United States citizenship.

That in a subsequent opinion rendered by the United States Court of Appeals for the Ninth Circuit, on January 19, 1951, on a supplemental Petition for Rehearing, it was held that the third count of indictment No. 20069 in which the petitioner stands convicted "charged the misrepresentation of citizenship to have been made to one Siu, a deputy sheriff of Los Angeles County. The evidence disclosed that the false statements with which appellant was charged were made in the course of a booking operation in the sheriff's office, after an arrest. The answers were recorded on a form sheet provided for the purpose. It appears that the lower

portion of the form which contains the false statement was filled in by Deputy Sheriff Hopkins, not Siu, and that Siu did not hear the false answers.” The foregoing affirmative finding of fact by the Court of Appeals establishes that the evidence to sustain the count on which your petitioner stands convicted is precisely the same as was offered and received to support the above two reversed counts. Further, Siu, to whom the alleged misrepresentation of citizenship was [27] made, testified that at another time outside of the presence of Deputy Sheriff Hopkins he asked the petitioner where he was born and how long he had lived in the United States, and that your petitioner replied that he was born in New York and had lived all his life in the United States. Deputy Sheriff Hopkins testified that Siu was not present and had left the County Jail booking office and was not present at the time he, Hopkins, asked the petitioner if he were a citizen of the United States. There was no evidence whatsoever that petitioner made any representation of United States citizenship to Siu, or that Siu was present when any representation of United States citizenship was made. That Siu was not present at the time the representation was made is clear from the record; in addition thereto, we have filed an Affidavit of said government witness, Jacob E. Siu, attached to our Motion pursuant to Section 2255, Title 28, United States Code, which reads as follows:

“That at no time did I ask the question appearing in Exhibit 5, ‘United States citizen?’ of Mr. Smiley, neither at the time of my interviewing him at 414½ North Hill Street, on or

about the 25th day of May, 1944, or later that day at the County Jail booking office in the presence of Milton S. Hopkins, Deputy Sheriff, or at any other time hear such a question put to Mr. Smiley. Neither on said day, or at any other time, did Mr. Smiley say to me that he was a citizen of the United States, nor did I hear him say so to any other person." [28]

The Judgment was rendered without jurisdiction and in violation of the Constitution, and laws of the United States.

Wherefore, petitioner prays that a Writ of Habeas Corpus in usual form issue, and that such other orders be entered as justice may require.

/s/ ALLEN SMILEY,
Petitioner.

OTTO CHRISTENSEN, and
JERRY GIESLER,

By /s/ OTTO CHRISTENSEN,
Attorneys for Petitioner.

Allen Smiley, being sworn, states that the foregoing signed by him is true.

/s/ ALLEN SMILEY.

Subscribed and sworn to before me this 19th day of February, 1951.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court.

[Endorsed]: Filed Feb. 19, 1951. [29]

At a stated term, to wit: The February Term, A.D. 1951, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 19th day of February, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Dave W. Ling,
District Judge.

[Title of Cause.]

MINUTE ORDER OF FEBRUARY 19, 1951
IN CASE No. 12885—BH

Otto Christensen and Jerry Giesler, Esqs., appearing as counsel for petitioner, and Ernest A. Tolin, United States Attorney, appearing as counsel for respondent, now come before the Court and stipulate that petition for Writ of Habeas Corpus may be submitted to Judge Ling.

Attorney Christensen makes a statement. Attorney Tolin makes oral statement of what the respondent's return would be. Attorney Tolin moves to dismiss the petition. Court grants said [30] motion.

United States District Court, Southern District
of California, Central Division

No. 12885—BH—Civil

UNITED STATES OF AMERICA, ex rel. ALLEN
SMILEY,

Petitioner,

vs.

JAMES BOYLE,

Respondent.

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS AND DISMISSING
PETITION

The above-entitled cause having come before the Court on this 19th day of February, 1951, on the verified Petition for Writ of Habeas Corpus, Otto Christensen and Jerry Giesler, Esqs., appearing for the petitioner; Ernest A. Tolin, United States Attorney, appearing for the respondent;

The Court being fully advised in the premises and a motion having been made by the respondent to dismiss the petition,

It Is Ordered, Adjudged and Decreed that said motion to dismiss the petition be, and it hereby is, granted.

Dated at Los Angeles, California, this 19th day of February, 1951.

/s/ DAVE W. LING,

United States District Judge.

Approved as to Form under Rule 7.

OTTO CHRISTENSEN, and
JERRY GIESLER,
Attorneys for Petitioner.

/s/ ERNEST A. TOLIN,
United States Attorney,
Attorney for Respondent.

Dismissal entered Feb. 20, 1951.

[Endorsed]: Filed Feb. 20, 1951. [31]

[Title of District Court and Cause.]

No. 12,885—BH

NOTICE OF APPEAL

Allen Smiley, Sunset Plaza, Los Angeles, California, Appellant.

Otto Christensen, 541 South Spring Street, Los Angeles 13, California, and Jerry Giesler, 9200 Wilshire Boulevard, Beverly Hills, California, Attorneys for Appellant.

Appellant filed his Petition for Writ of Habeas Corpus which Petition on motion of the respondent was ordered dismissed, the order denying the Petition for Writ of Habeas Corpus being entered in Judgment Book 71 at page 101.

I, the above-named appellant, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order and Judgment of the Dis-

trict Court dismissing this Petition for a Writ of Habeas Corpus, on the following grounds:

1. That the sentence under which Appellant is now held in custody was imposed in violation of the Constitution and laws of the United States;

2. That the Court was without jurisdiction to impose the sentence under which he is now in [32] custody.

ALLEN SMILEY,
By /s/ OTTO CHRISTENSEN.

OTTO CHRISTENSEN, and
JERRY GIESLER,
By /s/ OTTO CHRISTENSEN.

[Endorsed]: Filed Feb. 21, 1951. [33]

[Title of District Court and Cause.]

No. 20069

[Motion Pursuant to Section 2255, Title 28, U.S.C.]

No. 12,885—BH

STIPULATION

It Is Hereby Stipulated by and between counsel for Allen Smiley and the respondents, the United States of America and James Boyle, United States Marshal for the Southern District of California, as follows:

1. That the two causes above be consolidated on appeal;

2. That the record on appeal shall consist of:

(a) The certified printed Transcript of Record on Appeal in Case No. 12375, the original exhibits,

and the files and records of the Ninth Circuit Court of Appeals in said case;

(b) The motion of defendant, Smiley, in the United States District Court for the Southern District of California to vacate the Judgment and Sentence of that Court pursuant to Section [34] 2255, Title 28, U. S. C., and attached exhibits; the Trial Court's Findings of Fact and Conclusions of Law in said Motion to Vacate; the Order of the Trial Court dismissing said Motion; the Court Reporter's Transcript of the proceedings on the hearing of said Motion; the Clerk's Minutes of the proceedings on February 19, 1951;

(c) The Petition for Writ of Habeas Corpus; the Court's Order dismissing said Petition; the Clerk's Minutes of the proceedings on February 19, 1951; the Reporter's Transcript of the proceedings on the hearing of said Petition;

(d) The Notices of Appeal;

(e) This Stipulation;

(f) Designation of Points Relied On.

Dated this 21st day of February, 1951.

ERNEST TOLIN,

By /s/ ERNEST A. TOLIN,

Attorney for Respondents.

OTTO CHRISTENSEN, and

JERRY GIESLER,

By /s/ OTTO CHRISTENSEN,

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed Feb. 23, 1951. [35]

In the United States District Court, Southern
District of California, Central Division

No. 20,069—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALLEN SMILEY,

Defendant.

Honorable Dave W. Ling, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Monday, February 19, 1951

Appearances:

For the Plaintiff:

ERNEST A. TOLIN, ESQ.,
United States Attorney.

For the Defendant:

OTTO CHRISTENSEN, ESQ., and
JERRY GIESLER, ESQ.

* * *

Mr. Christensen: Then I imagine the next thing, so we can qualify to file our next motion, is that—the marshal is present and may it be considered that the defendant is now in custody of the United States Marshal?

The Court: All right, the defendant will be com-

mitted to the custody of the United States Marshal.

Mr. Christensen: And may I have the defendant now be [16*] sworn to this petition by the clerk because I think it calls for it and I couldn't have him swear he was in custody until he actually was, your Honor.

The Court: Yes.

Mr. Tolin: May the clerk inquire whether he has read the entire petition which he is now asked to take an oath?

The Court: Let the record show the oath was given by the clerk.

Mr. Christensen: Now in connection with that it refers to the transcript of the record as being attached and that is the complete transcript of record of the proceedings in the trial court and the Appellate Court which has been certified by the clerk of the United States Circuit Court of Appeals.

I am using the transcript of record in the Supreme Court which contains what course was followed in the Appellate Court and I would like to file that as the reference made in the motion. And secondly I want to file the opinion on the petition for rehearing.

The Court: Do you want to argue this motion?

Mr. Christensen: May I first inquire, your Honor, is there a photostatic copy of an affidavit attached to that motion?

The Court: Affidavit of Jacob Siu.

Mr. Christensen: Yes. That is the one I had in mind, your Honor. And I believe the other refer-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

ence was to the [17] opinion and I filed that and make it a part of this motion.

There are, of course, certain proceedings or procedure under the Act, and I am not unmindful of the fact that in view of the opinion that your Honor's hands are pretty much tied in the matter and it perhaps may be just fanning the air to argue the matter.

There is, however, one phase of it that might be discussed, not because I think it is going to affect your Honor's decision in the matter, but to point out that it is a very basic and substantial question that is involved.

Now when we raise the question on, I think it was a petition for—no, a petition for certiorari, we were not in the same situation that we are now. We now have a record and a positive record in this case by the finding of fact of the Appellate Court, and of course implemented by the Siu affidavit to this effect, that Siu did not hear nor was a representation made to him that he was a United States citizen; that all in this presence at any time that was ever stated was: "I was born in the United States and lived here all my life."

Now, let us have this thought in mind and your Honor recalls the theory upon which it was tried that that was sufficient, which with the Hopkins testimony and if I had been alert at that particular time I could have objected to that as evidence of a distinct and separate offense because [18] it was out of the presence of Siu, and it wasn't the thing that was charged. [19]

* * *

The Court: But it has been passed on by the Court of Appeals, has it not?

Mr. Christensen: That is right, it has been.

The Court: Then there is nothing for this court to do.

Mr. Christensen: I know your Honor can't, but I am going to make a motion when this is through for bail, and then I can appeal to the Court of Appeals and from there to the Supreme Court. That is the only way I can take it to the Supreme Court. That is the reason why I wanted to point those things out.

The Court: All right, we will start right now. The motion is denied. [21]

Mr. Christensen: Just a moment, your Honor. I think we should have reference to the statute—I believe it requires—let me see—“upon the motion and the files and record of the case conclusively showed that the prisoner is entitled to no relief the court shall cause notice——” you see if he comes to that conclusion, “the court shall cause notice thereof to be served upon the United States Attorney, grant an appropriate hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.”

Of course he is present and he is in court at this time, so he has all the notice that is necessary, and this, of course, may be considered the appropriate hearing upon all of the records, because we have the full record and the files of the court here, but it would still entail a finding of fact and conclusions

of law. In other words, I want it squarely so we don't get involved in some mechanics in our procedure.

If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack or that there has been a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack the court shall vacate and set aside the judgment and discharge the prisoner or re-sentence him or [22] grant a new trial or correct the sentence.

In other words, I am only looking to the mechanics of the statute and I think it would require findings of fact and conclusions of law, and I suppose any of us might prepare those and submit them.

I don't know when your Honor plans going back to Phoenix.

The Court: I am going back this evening. I have to try a case in Phoenix tomorrow morning.

Mr. Christensen: Well, I suppose we could get them over this afternoon.

Mr. Tolin: I will prepare them in the course of the day and get them down to your Honor.

The Court: All right. [23]

* * *

Mr. Christensen: Now, if your Honor please, the order being signed, I will then file a notice of appeal.

Mr. Tolin: Is the form of the order satisfactory, Mr. Christensen?

Mr. Christensen: Yes, the form of the order is satisfactory.

I will hand to the clerk and file Mr. Smiley's written notice of appeal, and having filed it I will now make a motion [30] as provided in the statute, your Honor, for an appeal to be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a writ of habeas corpus, and I now renew my motion and make a motion that he be enlarged on bail pending the disposition of his appeal in the Appellate Court.

The Court: That motion will be denied.

* * *

Mr. Christensen: I think it will be stipulated by the United States Attorney that this petition for writ of habeas corpus may be submitted to your Honor; is that correct, Mr. Tolin?

Mr. Tolin: Yes.

Mr. Christensen: It refers to the previous motion under Section 2255 and by reference adopts the record of the case and the matters referred to in the motion. And as I pointed out to your Honor, it is pursued because of the doubts with reference to 2255 and under 2255 it cannot be filed and submitted until after a motion under 2255 has been made and ruled on, so it presents precisely the same situation as under 2255, and of course I submit and offer the files of the case [31] and the record made upon the motion on 2255, on this motion for or petition for habeas corpus.

Mr. Tolin: Of course, your Honor, having just been served with that petition for habeas corpus,

which has been filed with the clerk of the court, I think less than 10 minutes ago, I have not been in a position to prepare a return or Mr. Christensen a traverse to the return, so we are rather up against that problem in laying the matter before the court today.

Mr. Christensen: I thought they forwarded a copy of it to you with those other motions, Mr. Tolin.

Mr. Tolin: I received it this morning, but I have been in court all morning.

Mr. Christensen: Yes.

Mr. Tolin: On another matter, and then during the noon recess we had the question of preparing findings with respect to the motion.

Now, I don't know what you might have in mind. We are willing to do anything that will not prejudice the substantial rights of either party, but I don't want to urge them on you if the court wants to set a date for hearing of this writ. If he does, we will be prepared as rapidly as possible.

Mr. Christensen: Well, I imagine it should have a return, although I do know in some instances that courts have on the face of the petition itself acted upon the petition and [32] actually summarily denied it, but that perhaps isn't the strict practice under the Act and there should be a return.

Mr. Tolin: I shall take no advantage of the fact there is no return if you wish to offer some kind of a stipulation. I can state what the return would show.

Mr. Christensen: Well, suppose you do that; state what the return will contain.

Mr. Tolin: The return would contain a statement that the petitioner, Allen Smiley, is in custody of the Attorney General by the representative of the Attorney General, the marshal of this court, pursuant to a judgment and commitment issued by this court upon a verdict of guilty returned by a jury at the trial of United States of America, plaintiff, versus Allen Smiley, defendant, in case No. 20,069 of the District Court of the United States in and for the Southern District of California, Central Division; that the defendant in that case, the petitioner in this case, are one and the same person; that the petitioner here was convicted on July 14, 1949, in the litigation between said Allen Smiley and the United States of America to which I have just referred, of one count, violation of the United States Code, Title 8, Section 746, and that the conviction was on count three of the indictment.

That the judgment and commitment were that the defendant in that case, the petitioner here, be committed to the custody [33] of the Attorney General for one year and pay a fine of \$1,000, and that the petitioner was this day, that is to say the 19th day of February, 1951, committed by order of the court to the custody of the marshal for the execution of that sentence. That he is therefore held lawfully for the lawful purpose of execution of the sentence of imprisonment pronounced against him.

That in subsance I think would be the return.

Mr. Christensen: And as to that return I will

stipulate that the return may be considered as a written return in response to the petition for habeas corpus.

Mr. Tolin: I hope that any minor technical deficiencies might be corrected, Mr. Christensen, because we ordinarily prepare returns not on the spur of the moment on our feet in open court.

Mr. Christensen: I appreciate that, and I know the intent and purpose of making the oral return to stand in the place of a written one, and any such deficiencies you will find me ready to stipulate to and acquiesce in.

Mr. Tolin: I think both counsel are interested in getting the matter disposed of if possible today, knowing that the judge presently presiding in the court has a matter in another district to attend to, and the petitioner in this matter desires that it be disposed of today, so if the court should decide to enlarge him upon bail, as you have indicated [34] you will ask the court to do, that that may be done before nightfall.

Mr. Christensen: Yes.

Mr. Tolin: So while I do not wish to be understood as in any way encouraging any ideas of bail in this case from the Government's standpoint, we are agreeable to cutting these corners on pleadings, particularly under the circumstances that the court is familiar with the contentions and the issues that have been drawn under the pleadings and presented in the motions filed this morning for relief under 2255 of Title 28.

Mr. Christensen: That is correct, and upon that

return to the petition we offer the verified petition and also offer the files and records in the case in evidence as well as the motions and files and records made on the motion to vacate the sentence under Section 2255.

I think that completes the record.

Mr. Tolin: I have nothing to offer beyond that.
I think it does complete the record.

The Court: Do you move to dismiss the petition?

Mr. Tolin: I move to dismiss the petition.

The Court: Motion granted. [35]

* * *

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 23rd day of February, A.D. 1951.

/s/ J. D. AMBROSE,
Official Reporter.

[Endorsed]: Filed Feb. 24, 1951.

[Title of District Court and Cause.]

No. 20069—Crim. No. 12885—BH—Civil

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 35, inclusive, contain the original Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code; Findings of Fact and Conclusions of Law Concerning Defendant's Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code; Order Denying Motion to Vacate and for Relief Pursuant to Section 2255, Title 28, United States Code, and Notice of Appeal, all in case No. 20069-Crim.; and the original Petition for Writ of Habeas Corpus, Order Denying Petition for Writ of Habeas Corpus, and Dismissing Petition and Notice of Appeal, all in case No. 12885-BH-Civil; and a full, true and correct copy of minute orders entered February 19, 1951, in both of the above-entitled causes, and the original Stipulation re record on appeal in both cases which, together with copy of the reporter's transcript of proceedings on February 19, 1951, and the copy of the Transcript of Record on Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the case entitled Allen Smiley, Petitioner, vs. United States of America, Respondent, in the Supreme Court of the United States, which was filed as an exhibit to the Motion to Vacate, etc., pursuant to

Section 2255 of Title 28, U. S. Code, in case No. 20069, transmitted herewith, constitute the record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.40, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24th day of February, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12866. United States Court of Appeals for the Ninth Circuit. Allen Smiley, Appellant, vs. United States of America and James J. Boyle, United States Marshal for the Southern District of California, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed February 26, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12866

UNITED STATES OF AMERICA,

Plaintiff and Respondent,

vs.

ALLEN SMILEY,

Defendant and Appellant.

In the Matter of
The Application of ALLEN SMILEY, for a Writ
Of Habeas Corpus.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL, AND DESIGNATION OF PARTS
OF RECORD NECESSARY FOR CONSID-
ERATION THEREON

Points on Which Appellant Intends to Rely on
Appeal:

I.

The trial court erred in dismissing defendant's
Motion Pursuant to Section 2255, Title 28, United
States Code.

II.

The trial court erred in its Findings of Fact and
Conclusions of Law on said Motion Pursuant to
said Section 2255.

III.

That the trial court erred in granting respondent's Motion to Dismiss Petitioner's Application for a Writ of Habeas Corpus.

Designation of Record

Print the entire supplemental record referred to in sub-paragraph (b) of the Stipulation respecting the contents of the record on appeal with the exception of the Court Reporter's Transcript and as to the Court Reporter's Transcript print the following: Line 19, p. 16 to line 2, p. 19; Line 14, p. 21 to line 13, p. 23; Line 18, p. 30 to line 7, p. 31; Line 13, p. 31 to line 22, p. 35.

Also, print all of the matter referred to in sub-paragraphs (c) to (f) inclusive.

OTTO CHRISTENSEN and
JERRY GIESLER,
By /s/ OTTO CHRISTENSEN,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 2, 1951.

